BILLINGS *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* BILLINGS.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 66 and 625. Argued January 6, 7, 1914.—Decided February 24, 1914.

The jurisdiction of this court on direct writ of error is not confined to the constitutional questions, but embraces every issue in the case. *Williamson* v. *United States*, 207 U. S. 425.

The Circuit Court of Appeals has no power to ask instructions upon an issue which it has no right to decide, nor has this court authority to instruct on such a subject.

This court cannot refuse to decide questions which are properly before it for judgment.

Where one party has taken a writ of error direct from this court to the Circuit Court based on the constitutional question decided against

it, and the other party has obtained a writ of error from the Circuit Court of Appeals as to other questions decided against it, which court has certified that question to this court, and the record is in such condition as to enable this court to decide the whole case, this court may treat the writ of error from the Circuit Court of Appeals as a cross-writ and so determine all the issues involved.

Under § 37 of the Tariff Act of August, 1909, imposing a tax on the use of foreign-built yachts owned or chartered for more than six months by citizens of the United States, to be collected annually on September 1, the tax became due on the first day of September next occurring after the act became effective; further *held* that the six months' clause relates only to the chartering of the yachts, and the word "annually" indicates continuity and that the tax is not a sporadic one to cease after a single payment.

Where words are used in a statute in their every-day sense and not in a technical one, they should be so construed.

The use of a foreign-built yacht which renders the owner subject to the tax imposed by § 37 of the Tariff Act of 1909 is active and actual use and not the potential use arising from the mere fact of ownership. See *Pierce* v. *United States*, p. 290, *post*.

The fact that a tax statute operates retroactively does not necessarily cause it to be unconstitutional. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

The rule that statutes should be construed if possible so as not to operate retroactively does not authorize a judicial reënactment of the statute to save it from acting retroactively if Congress intended it so to do.

Section 37 of the Tariff Act of 1909, imposing a tax on foreign-built yachts, is not unconstitutional because it operates retroactively as to the tax levied for the year 1909, and the use of yachts within the meaning of the statute during the year 1909, renders the owner or charterer liable for the tax for that year.

The requirement of uniformity imposed by the Constitution on Congress in levying excise taxes is not intrinsic but geographic.

The Constitution is not self-destructive—it does not take away by one provision powers conferred by another, and the express authority to tax is not limited or restricted by subsequent provisions or amendments, especially the due process clause of the Fifth Amendment. *McCray* v. *United States*, 195 U. S. 27.

The difference between things domestic and things foreign is recognized by the Constitution itself, and a classification for taxation of foreign-

built yachts is not so repugnant to justice as to amount to denial of due process of law because domestic-built yachts are not subject to the same tax; nor is § 37 of the Tariff Act of 1909, unconstitutional for lack of uniformity.

The state rule as to interest on taxes differs from the United States rule—the former excludes interest unless the statute so provides; the latter allows interest unless forbidden by statute. This court will not now apply the state rule, as to do so would repudiate settled principles and disregard the sanction expressly or impliedly given by Congress to the rule adopted by the Federal courts.

The Government is entitled to interest on taxes on use of foreign-built yachts under § 37 of the Tariff Act of 1909, from the date when the taxes become due, and may maintain an action against the owner or charterer therefor.

190 Fed. Rep. 359, modified and affirmed.

THE facts, which involve the construction and constitutionality of § 37 of the Tariff Act of 1909, imposing a tax on the use of foreign-built yachts, are stated in the opinion.

Mr. William D. Guthrie for the owners of foreign-built yachts, in this and other cases argued simultaneously herewith:

The classification in § 37 violates the Fifth Amendment.

A tax law must be imposed impartially upon all in the same class similarly situated, and must apply equally and uniformly to all persons in like circumstances or under like conditions.

The yacht owners purchased their yachts when no import duty or excise tax was imposed or ever had been imposed by Congress upon foreign-built yachts, *The Conqueror*, 166 U. S. 110, and presumably have duly paid the tonnage tax laid upon all vessels classed as foreign. The practical effect of this legislation is to penalize them and compel them to pay an import duty of thirty-five per centum *ad valorem* as the alternative to submitting to this new tax. The act is precisely the same as if it had provided in so many words that all citizens who had theretofore acquired foreign-built yachts should pay a retrospective im-

port "duty of thirty-five per centum *ad valorem*" in order to escape an annual tax of seven dollars per ton. *Henderson* v. *New York*, 92 U. S. 259, 268; *Bailey* v. *Alabama*, 219 U. S. 219, 244. See Cooley on Taxation, 3d ed., pp. 4, 260.

The classification is in conflict with sound principles of constitutional taxation. *Knowlton* v. *Moore*, 178 U. S. 41, 77; *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89, 92; *The Conqueror*, 166 U. S. 110, 115. See also *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Gulf, Colo. &c. Ry.* v. *Ellis*, 165 U. S. 150, 165; *Magoun* v. *Illinois Trust Bank*, 170 U. S. 283, 301; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606, 607; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 599; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121; *Detroit &c. Ry. Co.* v. *Fuller*, 205 Fed. Rep. 86, 89; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

As to the selection of property according to origin as a subject for a special form of taxation, see *Phillips* v. *Raynes*, 136 App. Div. 417, aff'd 198 N. Y. 539, holding void under the Fourteenth Amendment, § 190 of the New York Labor Law prohibiting sale of convict-made goods without the payment of an annual license fee of $500. See also *Farrington* v. *Mensching*, 187 N. Y. 8, 17; *People* v. *Hawkins*, 157 N. Y. 1, 9; *Knowlton* v. *Rock County*, 9 Wisconsin, 410, 422.

While in the case of import duties the foreign origin of the article imported is necessarily the basis and test of the duty, the yacht tax now before the court purports to be an excise tax upon the use of an article and not upon its importation. The law, therefore, must be treated solely as an excise tax upon use, and cannot be sustained upon a theory which might uphold an import duty.

There is no substantial difference between the requirement of due process of law contained in the Fifth Amendment and that in the Fourteenth Amendment. *Carroll* v.

Greenwich Ins. Co., 199 U. S. 401, 410; *Twining* v. *New Jersey*, 211 U. S. 78, 101.

The act of Congress requires use of a foreign-built yacht during the taxable period.

Tax statutes, especially when attempting to impose special, novel and extraordinary taxes, should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favor of the citizen. *Eidman* v. *Martinez*, 184 U. S. 578, 583; *United States* v. *Wigglesworth*, 2 Story, 369, 374; *Mutual Benefit Life Ins. Co.* v. *Herold*, 198 Fed. Rep. 199, 201, aff'd 201 Fed. Rep. 918; *Parkview Bldg. Assn.* v. *Herold*, 203 Fed. Rep. 876, 880; *Mutual Trust Co.* v. *Miller*, 177 N. Y. 51, 57.

The language plainly indicates that it was the intention to levy a tax not upon foreign-built yachts as property but solely upon their use. *The Anjer Head*, 46 Fed. Rep. 664.

The distinction between an excise tax on the use of a thing and a direct tax upon the thing itself is, of course, fundamental and substantial. But it would vanish into nothingness if "use" be now construed to mean not actual use at all but mere capacity for use.

The word "use" was advisedly employed in order to avoid creating what might be held to be a direct tax on the property, and as such necessary to be apportioned. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429; 158 U. S. 601; *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295, 306. The court will not, therefore, now adopt a construction of the statute which would create grave doubts as to its constitutionality, when another construction, which avoids all constitutional difficulties, is not only equally consistent with the terms of the act, but more consonant with its plain intent. *United States* v. *Del. & Hud. Co.*, 213 U. S. 366, 408; *The Abby Dodge*, 223 U. S. 166, 175; *United States* v. *Nipissing Mines Co.*, 206 Fed. Rep. 431; *Abrast Realty Co.* v. *Maxwell*, 206 Fed. Rep. 333.

The tax is not leviable in respect of foreign-built yachts not within the jurisdiction of the United States.

Property in order to be the subject of taxation must be within the jurisdiction of the power assuming to tax. *Buck* v. *Beach*, 206 U. S. 392, 400. If the yachts in question had no permanent situs anywhere, the fact that their owners were domiciled abroad would fix their situs there. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 69; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194.

The power to tax depends upon jurisdiction of the subject-matter of the tax.

Taxation must have relation to some subject-matter actually within the jurisdiction of the taxing power, otherwise it violates the constitutional guaranty against the taking of property without due process of law. Neither a State nor the Federal Government can tax the property of citizens situated in foreign countries, or the use of such property in foreign countries. *Railroad Co.* v. *Jackson*, 7 Wall. 262, 267; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 307; *Delaware &c. R. R.* v. *Pennsylvania*, 198 U. S. 341, 353; *Chi., B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 592; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 399; *Selliger* v. *Kentucky*, 213 U. S. 200, 203; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 38; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 73; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 372, 376, 377; *Detroit &c. Ry. Co.* v. *Fuller*, 205 Fed. Rep. 86, 90.

There is no law of the United States which authorizes the Secretary of the Treasury to extend any special right or privilege to foreign-built yachts owned by American citizens, and the action of the Treasury Department cannot make these yachts American vessels or classify them otherwise than Congress has done. *White's Bank* v. *Smith*, 7 Wall. 646, 655, 656.

Conceding that Congress has power to tax the use of foreign-built yachts owned and used outside of the United States by American citizens permanently residing abroad, it has not expressed the intention so to do. Such a novel tax burden should be expressed in plain terms, free from doubt or ambiguity. *Eidman* v. *Martinez*, 184 U. S. 578, 583; *Lynch* v. *Union Trust Co.*, 164 Fed. Rep. 161, 163.

Section 37 fails to reveal any such legislative intent. 190 Fed. Rep. 368, 369.

Section 37 should not be construed as retrospective so as to tax the use of foreign-built yachts during the year 1909.

One who has owned property, or exercised or enjoyed a right or privilege, or carried on a vocation, at a time and under circumstances when such ownership or acts were not taxable, ought not to be subjected to a special, novel and extraordinary tax by a subsequent statute operating retrospectively upon his past ownership or acts. *N. Y. C. & H. R. R. R. Co.* v. *Gaus*, 200 N. Y. 328, 330.

A tax should not be levied upon past ownership so as to cover a period when the property was not subject to taxation. *People* v. *Trust Co. of America*, 205 N. Y. 74, 77. A statute imposing a tax upon use should not be construed retrospectively unless the language imperatively requires it. *U. S. Fidelity Co.* v. *Struthers*, 209 U. S. 306, 314; *United States* v. *Heth*, 3 Cr. 399, 413; *Assur. Soc'y* v. *Miller*, 179 N. Y. 227; 180 N. Y. 525, 526; *Metz* v. *Hagerty*, 51 Oh. St. 521. See also *United States* v. *Burr*, 159 U. S. 78, 82; *United States* v. *Am. Sugar Co.*, 202 U. S. 563, 577; *Holliday* v. *Atlanta*, 96 Georgia, 377; *Young* v. *Henderson*, 76 N. Car. 420; 2 Lewis' Sutherland Stat. Const. (2d ed.), p. 640.

If it be held that it must be presumed that Congress intended that the obligation to pay the tax should begin to accrue from the date when the act took effect, this annual tax on use should be apportioned according to the period of actual use during the year ending September 1, 1909,

while the tax law was in force and operation. *Mutual Trust Co.* v. *Miller*, 177 N. Y. 51, 54, 56. See *Lincoln Trust Co.* v. *Glynn*, 132 App. Div. 546, 547, aff'd 198 N. Y. 501, and distinguished in *N. Y. C. & H. R. R. R. Co.* v. *Gaus*, 200 N. Y. 328, 331.

The Government is not entitled to recover interest. The burden of a tax should not be increased by the addition of interest unless such a purpose of the legislature has been clearly expressed. *Hartford* v. *Hills*, 75 Connecticut, 599, 600. What the State omitted to demand, the court cannot require. *People* v. *Gold & Stock Tel. Co.*, 98 N. Y. 67, 80.

The act itself shows that Congress did not intend to exact interest as a penalty for delay in payment of the tax.

Courts may not find an intention to impose interest as a penalty for delay in payment of taxes and cannot award interest on taxes unless there be some express statutory provision to that effect. *Crabtree* v. *Madden*, 54 Fed. Rep. 426, 431; *People* v. *Gold & Stock Tel. Co.*, 98 N. Y. 67, 79; *Rochester* v. *Bloss*, 185 N. Y. 42, 52; *Camden* v. *Allen*, 26 N. J. L. 398, 399; *Belvidere* v. *Warren R. R. Co.*, 34 N. J. L. 193, 199; *Road Commissioners* v. *Freeholders*, 44 N. J. L. 570, 571, aff'd 45 N. J. L. 173; *Brennert* v. *Farrier*, 47 N. J. L. 75; *Shaw* v. *Peckett*, 26 Vermont, 482, 486; *Hughes* v. *Kelley*, 69 Vermont, 443, 445; *Perry* v. *Washburn*, 20 California, 318, 350; *People* v. *C. P. R. R. Co.*, 105 California, 576, 595; aff'd 162 U. S. 91; *Sargent & Co.* v. *Tuttle*, 67 Connecticut, 162, 167; *Hartford* v. *Hills*, 72 Connecticut, 599; *Cromwell* v. *Savage*, 85 Connecticut, 376, 377; *Stitt* v. *Stringham*, 55 Oregon, 89, 94; *State* v. *Mutual Life Ins. Co.*, 175 Indiana, 59, 85; *State* v. *Southwestern R. R. Co.*, 70 Georgia, 11, 32, 33; *Georgia R. R. Co.* v. *Wright*, 124 Georgia, 596, 618; 125 Georgia, 589, 610, reversed on other grounds in 207 U. S. 127; *McWilliams* v. *Jacobs*, 128 Georgia, 375, 378; *Louisville & N. R. Co.* v. *Commonwealth*, 89 Kentucky, 531, 538; *Illinois Cent. R. Co.* v. *Adams*, 29 So. Rep. 996, 997 (Miss.); *New Whatcom* v. *Roe-*

der, 22 Washington, 570, 575; *State* v. *New England Furniture Co.*, 107 Minnesota, 52, 53; *Perry County* v. *Railroad Co.*, 65 Alabama, 391, 401; *Edmonson* v. *Galveston*, 53 Texas, 157, 161; *West. Un. Tel. Co.* v. *State*, 55 Texas, 314, 319, reversed on other grounds in 105 U. S. 460; *Cave* v. *Houston*, 65 Texas, 619, 622; *Brooks* v. *State*, 58 S. W. Rep. 1032, 1035 (Tex.); *Rockland* v. *Ulmer*, 87 Maine, 357, 361; *Danforth* v. *Williams*, 9 Massachusetts, 324; *Greer* v. *Richards*, 3 Arizona, 227, 235; 1 Cooley on Taxation, 3d ed., pp. 19, 20; 27 Am. & Eng. Encyc. of L., 2d ed., p. 777; 37 Cyc. 1165.

This is not a suit for the recovery of taxes in an action in the nature of debt as *Meredith* v. *United States*, 13 Pet. 486; *United States* v. *Chamberlin*, 219 U. S. 250. The form of procedure cannot change their character. See also *Boston* v. *Turner*, 201 Massachusetts, 190, 193; *Gautier* v. *Ditmar*, 204 N. Y. 20, 27.

In nearly all of the tax cases cited by the Government in the court below, the question of interest was not before the court.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States, in this and other cases argued simultaneously herewith:

The tax was due September 1, 1909. The act was approved August 5, 1909, and took effect from its passage. The act, as so construed, is not retroactive. Endlich, Statutes, § 280; *Johnston* v. *United States*, 17 Ct. Cl. 157, 171; *Locke* v. *New Orleans*, 4 Wall. 172; *People* v. *Spring Valley Co.*, 92 N. Y. 383, 390; *Frellsen* v. *Mahan*, 21 La. Ann. 79, 103; *McClellan* v. *Railroad*, 11 Lea (Tenn.), 336. See also *State* v. *Certain Lands*, 40 Arkansas, 344; *Litson* v. *Smith*, 68 Mo. App. 397, 402; *Fennell* v. *Pauley*, 112 Iowa, 94; *Hudson* v. *Miller*, 10 Kans. App. 532; *Hardesty* v. *Fleming*, 57 Texas, 395; *Brown* v. *Houston*, 114 U. S. 622.

The contention that another rule of construction applies to an indirect tax like the present cannot prevail. The tax is upon the present use of the property, whether that use has endured for a year or for a day. The tax is called an annual one, which means that the tax is to be collected once a year.

Even if such construction does give the statute a retroactive effect, Congress intended the tax to be paid September 1, 1909.

Congress has the power to lay a retrospective tax. *Locke* v. *New Orleans*, 4 Wall. 172; *Stockdale* v. *Ins. Companies*, 20 Wall. 323, 331; *Railroad Co.* v. *Rose*, 95 U. S. 78, 80; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 108; Cooley, Taxation, 3d ed., 492, 494.

Courts will construe a statute retrospectively when that is clearly the legislative intent. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Lamb* v. *Powder River Co.*, 132 Fed. Rep. 434.

The language of the act shows a clear intention to make it immediately effective. *Pauley Mfg. Co.* v. *Crawford County*, 84 Fed. Rep. 942.

Punctuation is to be given little weight in determining the legislative intent. *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 480.

A construction which leads to absurd and unjust consequences is to be avoided if possible. *Pickett* v. *United States*, 216 U. S. 456, 461.

The tax cannot be apportioned. *McClellan* v. *Railroad*, 11 Lea, 336.

The tax is upon consumption or upon the privilege of using, and is not avoided by failure to employ the yacht on cruises.

The language of the act indicates that the tax is to be levied upon the use of foreign-built yachts.

The transaction of active business is the thing taxed;

the income derived therefrom is included in the measure of the tax. Were it otherwise the tax would probably run counter to the decision of this court in *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429.

A privilege tax is not direct simply because measured by capacity for use. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 166; *United States* v. *Singer*, 15 Wall. 111; *Hylton* v. *United States*, 3 Dall. 171.

While economically the incidence of the present tax is upon the yacht itself, its legal incidence is upon the privilege of using, and whether this be called a tax upon consumption, potential use, or capacity for use, it is indirect in the constitutional sense. *Knowlton* v. *Moore*, 178 U. S. 81, 83; *Missouri &c. Ry. Co.* v. *United States*, 231 U. S. 112.

The reasonable construction of the act shows that the tax is primarily a revenue measure and secondarily designed to encourage the building of yachts in America, and there would be no object in exempting yachts out of commission.

The privilege of use, as shown by ownership or a charter of more than six months, is the only test of liability imposed by the act.

The tax applies to every foreign-built yacht belonging to a citizen of the United States, though such citizen be domiciled and resident abroad and the yacht has acquired a permanent situs abroad.

The statute is to be construed sensibly and to accomplish the legislative intent. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 17.

The congressional proceedings, however, clearly indicate that Congress understood that the tax would apply to the specific yachts now involved. Cong. Rec., Part V, 61st Cong., 1st sess., p. 4875. See *Eidman* v. *Martinez*, 184 U. S. 591.

Every citizen of the United States comes within the

description. *United States* v. *Chamberlin*, 219 U. S. 263.

In other income statutes there were reasons for naming non-resident citizens. See act of August 5, 1861, 12 Stat. 309; act of June 30, 1864, 13 Stat. 281; Tariff Act of October 3, 1913.

The United States merely asks that the language used be given its plain meaning, and that no words of exception be read into the statute under the guise of construction.

The annual tax is an excise, and is uniform throughout the United States. Geographical uniformity is the only limitation imposed by the Constitution. This limitation being observed, the tax does not amount to deprivation of property without due process of law, even if in its operation it be found intrinsically unequal. And the present tax would be valid, even were the equal protection of the laws clause of the Fourteenth Amendment applicable.

Admittedly, the tax is an excise. *Hylton* v. *United States*, 3 Dall. 171; *Knowlton* v. *Moore*, 178 U. S. 41, 84; *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107.

The present tax meets this requirement of geographical uniformity. It operates upon every citizen of the United States owning a foreign-built yacht, wherever such citizen may be found.

The classification of the statute is reasonable within the equal protection of the laws clause of the Fourteenth Amendment. *District of Columbia* v. *Brooke*, 214 U. S. 138; *Second Employers' Liability Cases*, 223 U. S. 1.

As to the scope of the equal protection of the laws clause, see *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Metropolis Theater Co.* v. *Chicago*, 228 U. S. 61, 69; *Chicago Dock Co.* v. *Fraley*, 228 U. S. 680, 686.

One assailing the classification must carry the burden

of showing that it does not rest on any reasonable basis, but is essentially arbitrary. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Barrett* v. *Indiana*, 229 U. S. 26, 30.

A tax law may be adopted to further a specific policy or to accomplish a certain purpose. *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

The classification involved includes all citizens who own or charter foreign-built yachts. Two reasons exist for putting them in a class apart from owners of domestic-built vessels—one a question of revenue, and the other a matter of policy. *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364.

As a matter of policy, Congress desired to develop the shipbuilding industry of the United States.

A classification by which the producer-seller and the purchaser-seller are distinguished is proper. *Am. Sugar Co.* v. *Louisiana*, 179 U. S. 89; *St. John* v. *New York*, 201 U. S. 633; *Adams* v. *Milwaukee*, 228 U. S. 572.

The principle of imposing a duty because of the foreign origin of goods is the foundation of our tariff system. See § 5 of the Tariff Act of 1897, 30 Stat. 205; §§ 3385, 3386, Rev. Stat.

The United States may tax the use of yachts owned by its citizens, even though such citizens are domiciled abroad and their yachts have a foreign situs. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Ayer & Lord* v. *Kentucky*, 202 U. S. 409; *Southern Pacific Co.* v. *Kentucky*. 222 U. S. 63, do not apply.

These decisions have arisen from attempts by a State to tax absent property. The United States, as a nation, is not bound by the same rule, as it is not confined by its territorial limitations in the protection of its citizens and their property. Its protection extends throughout the world. The United States may tax its citizens residing abroad. Acts of June 30, 1864, § 116, 13 Stat. 281;

March 2, 1867, 14 Stat. 477; August 27, 1894, 28 Stat. 553; July 14, 1870, 16 Stat. 257. See *United States* v. *Erie Ry. Co.*, 106 U. S. 330.

Ships are in a class by themselves. A yacht belonging to a citizen of the United States, even though not a vessel of the United States in the sense that it is entitled to registry or enrollment, yet flies the American flag, and is the object of peculiar protection by the United States.

These yachts fly the American flag. *The Conqueror*, 166 U. S. 119.

They are territory of the United States to which our laws extend. Clark & Marshall on Crimes, 2d ed., p. 737; 2 Moore, Int. Law, pp. 256, 266, and see § 272, Penal Code, 35 Stat. 1142.

Treaties have been made with foreign nations permitting the punishment by this country of certain offenses committed on such vessels in foreign ports. *Wildenhus's Case*, 120 U. S. 1, 12.

The protection thus given by the United States to these yachts is as great as if they were entitled to registry or enrollment; and it is conceivable that such a case may arise with respect to one of them as to involve the United States in war with a foreign country.

Additional privileges within the waters of the United States are extended to these yachts. Sections 4225, 4226, Rev. Stat., and see also § 4190, Rev. Stat.

The owner of the yacht is exempt from the payment of the light money. *The Miranda*, 47 Fed. Rep. 815, aff'd 51 Fed. Rep. 523; and see *The Conqueror*, 166 U. S. p. 119; *The Alta*, 136 Fed. Rep. 513.

The right to tax may be supported by analogy to the right of a nation to punish its citizens for crimes committed abroad. Clark & Marshall, Crimes, p. 743; Beale, Crim. Pl. & Pr., p. 2; 2 Moore, Int. Law, 255.

The paragraph of § 37, permitting the owner of any yacht to pay a duty of 35 per cent. *ad valorem* in lieu of the

annual tax, is not unconstitutional, and if so may be separated from other legal provisions and effect be given to the latter.

Section 37 is not unconstitutional because it originated in an amendment first proposed in the Senate. *Flint* v. *Stone-Tracy Co.*, 220 U. S. p. 143.

A foreign-built yacht is liable to the tax, notwithstanding the treaty of July 3, 1815, with Great Britain.

The court below finds as a fact that under the law of Great Britain a ship is not a British vessel unless owned by a subject or corporation of that country. Where the bill of sale has been recorded with the collector of customs of a United States port, the yacht has lost her character as a British vessel and is not within the treaty.

A treaty is repealed by an inconsistent subsequent act of Congress.

A suit *in personam* lies to recover the duty. *United States* v. *Chamberlin*, 219 U. S. 250, 258.

The United States is entitled to interest on the several taxes from the time they became due. *Rochester* v. *Bloss*, 6 L. R. A. (N. S.) 694.

Although a State does not see fit to exert its extraordinary power of imposing heavy penalties, it is none the less entitled to the ordinary interest upon the tax from the time it falls due until it is paid. *Young* v. *Godbe*, 15 Wall. 562, 565; *People* v. *New York*, 5 Cowen, 334.

Duties on imported merchandise constitute personal debts to the United States from the importers and an action of debt will lie to collect them with interest. *United States* v. *Lyman*, 1 Mason, 482; *Meredith* v. *United States*, 13 Pet. 486; *Cheang-Kee* v. *United States*, 3 Wall. 320; *United States* v. *Dodge*, 1 Deady, 124; *United States* v. *Cobb*, 11 Fed. Rep. 76; *United States* v. *Mexican Int. Ry. Co.*, 154 Fed. Rep. 519.

It is immaterial that the tax is technically a debt. The amount is definite, and time of payment fixed and cer-

tain. *Railroad Co.* v. *United States*, 101 U. S. 550; *Litchfield* v. *Webster County*, 101 U. S. 773; *United States* v. *Erie Ry. Co.*, 106 U. S. 327.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

It is necessary to determine whether these two cases from different courts are not virtually one and to be considered in that aspect.

The United States sued for the amount of a tax with interest. The alleged liability under the statute was challenged and if it existed the statute was alleged to be repugnant to the Constitution of the United States, and right to interest was denied. The court held the statute to be constitutional and judgment was awarded for the sum claimed, but the prayer for interest was rejected. Error was prosecuted directly from this court by the defendant and from the Circuit Court of Appeals by the United States, the first because of the constitutional questions and the second because of the disallowance of interest. The Circuit Court of Appeals certified a question concerning the right to recover interest, and the two cases before us consist of the direct writ of error on the one hand and the certificate on the other. Both writs of error when taken were authorized. *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101; *Macfadden* v. *United States*, 213 U. S. 288. Our jurisdiction, however, on the direct writ of error is not confined to the constitutional questions, but embraces every issue in the case. *Williamson* v. *United States*, 207 U. S. 425. The Circuit Court of Appeals, however, has no power to ask instructions upon an issue which it has no right to decide and we have no authority to instruct on such a subject or to refuse to decide issues which are properly before us for judgment.

Under these conditions, we think the better practice is,

as regards the controversy as to interest which was taken to the Circuit Court of Appeals by writ of error and in which cases the certificates now before us were drawn, to treat the writ of error from the Circuit Court of Appeals as in substance pending here on a cross-writ by the United States, and as without further orders the record is in such a condition as to enable us to decide the whole case, we proceed to do so.

Section 37 of the Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 112, provided in part as follows:

"There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton."

The second paragraph of the provision which we need not quote, gives the right to the owner of any "foreign-built yacht, pleasure-boat or vessel above described" to pay a duty of 35 per cent. *ad valorem* and thus secure an exemption from the tax provided by the first paragraph.

The act went into effect on August 6, 1909, and the collector of the port of New York thereafter made a demand upon C. K. G. Billings, the plaintiff in error, for the payment of $7,644.00, that is, of the sum produced by calculating seven dollars per ton on 1,091.71 tons, the tonnage of the foreign-built yacht Vanadis, owned and controlled by him.

Failing to pay, in January, 1911, the United States sued in the court below to recover the tax. The defendant was alleged to be a citizen of the United States and the suit was averred to have been brought in the district nearest his residence. The ownership and use by him of the pleasure-yacht Vanadis, an English foreign-built vessel,

the levy based upon her tonnage according to the statute of the amount of $7,644, the demand for payment, the failure to pay on the first day of September, 1909, under the statute, were all alleged, and recovery of the tax as well as of interest was prayed. The answer admitted citizenship and the ownership of the yacht and that she was a foreign-built pleasure craft, but set up three distinct defenses, the first, that the vessel was not enrolled, registered, or documented as a vessel of the United States and enjoyed no privileges because she was of that character. It was expressly admitted that "during the year preceding the first day of September, 1909" the said yacht "has been used by the defendant outside of the waters and territorial limits or jurisdiction of the United States from time to time and at various times . . . and was not used for six months during such year within the waters and territorial limits or jurisdiction of the United States or elsewhere."

The second defense expressly averred that the tax imposed by the statute was intended by Congress to be "an annual tax, that it should be prospective and operate only upon the future use of any such foreign-built yacht, pleasure-boat or vessel, and that said annual tax did not accrue and could not be duly levied and collected prior to the first day of September in the year 1910."

The third defense, after fully averring that there were within the United States many pleasure yachts not foreign-built which were in use and whose use was identical with that of a foreign-built yacht like the one which the defendant used, charged that the law imposing the burden sought to be enforced was void because repugnant to the due process clause of the Fifth Amendment. The case was submitted to the court on bill and answer and as we at the outset said, there was a judgment holding that the sum claimed was due by the defendant as an excise or duty upon the use of his yacht and that the act imposing

the tax was not repugnant to the Constitution, but that the Government was not entitled to recover interest.

To avoid if it may be the necessity of determining the constitutional question, we shall first decide what, if any, burden the statute imposes, and then if necessary consider its asserted repugnancy to the Constitution. In view of the requirement that direct taxes be apportioned and assuming as we do assume, that the act before us was adopted by Congress in the light of the ruling in *Pollock* v. *Farmers Loan & Trust Company*, 157 U. S. 429, 158 U. S. 601, it is certain that the tax levied by the provision was intended to be an excise tax upon "the use of every foreign-built yacht, pleasure-boat or vessel . . . now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States." This is not seriously, if at all, disputed in argument, the controversy turning first upon the period when the tax provided for is to take effect and the nature and character of the use which is taxed. These subjects are so interwoven that we consider and dispose of them together.

Was the tax due on the first day of September, 1909, or was it only due on the same day in September, 1910? In view of the positive direction that the tax shall be levied and collected on the first day of September, we can see no escape from the conclusion that the court below was right in holding that it became due on the first day of September after the passage of the act. The word "annually" upon which so much reliance to the contrary is placed, is manifestly used not for the purpose of postponing the time of payment, but rather as provision for continuity; that is, the word but shows the purpose of fixing the annual duty of levying and collecting the tax on the designated day. This becomes quite apparent when it is observed that if the word "annually" be removed, there would be room for the implication that the tax was to be but sporadic and would therefore cease to

be collectible after one payment. And it is equally clear that the six months clause is concerned not with the period when the tax imposed shall be levied and collected, but addresses itself to the subject-matter upon which the tax is placed; in other words, it qualifies the word "charter" and therefore only indicates when the use of a chartered vessel shall become subject to the duty imposed. The tax being leviable and collectible, on the first of September in each year after the passage of the act, upon what was it assessed? is the question. It seems difficult to answer it in clearer terms than does the text of the act when it provides that it shall be upon the use of the yachts with which the provision is concerned. But it is said to respond in the language of the act leaves the question virtually unanswered, since the extent of the use and its essential period are left wholly undetermined. But this is a misconception based upon a disregard of the fact that the word "use" in the text is unqualified, from which it results that the recurrence of the tax is annual and depends upon two elements, ownership or charter rights, as specified in the act, and use for any time during the year. It is to be observed that the provision deals with ownership and distinguishes between ownership and use, since it bases the tax not upon the former but upon the latter. From this it follows that it is not ownership but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership, the right to use which is the subject upon which the statute places the excise duty. In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership, for that in the statutory sense could exist without use having taken place. The words of the statute under this construction were used in an every-day sense and not in a technical one: in other words but convey the distinction without reference to nice analysis of the nature of things which is

commonly conceived to exist between ownership and use. Let it be conceded that the ownership of property includes the right to use, plainly we think, as use and ownership are distinguished one from the other in the provision, the word "use" as there employed means more than the mere privilege of using which the owner enjoys, and relates to its primary signification, as defined by Webster; "The act of employing anything or of applying it to one's service; the state of being so employed or applied." If the use which arises from the fact of ownership without more was what the statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective), a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective), that is, it is the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership. The contention that inequality must be the result from making the tax depend upon mere use without reference to the extent of its duration, addresses itself not to the question of power, and is therefore beyond the scope of judicial cognizance. But it is to be observed that it may well have been that the character of the property with which the statute deals and the mere element of

caprice as to its use and the uncertainties of the subject led to the fact of making the use alone the criterion as the wiser and juster method of operating equally upon all. Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. *Flint* v. *Stone-Tracy Company*, 220 U. S. 107 and authorities there cited. While the rule is that statutes should be so construed as to prevent them from operating retroactively, that principle is one of construction and not of reconstruction and therefore does not authorize a judicial reënactment by interpretation of a statute to save it from producing a retroactive effect.

As under the meaning which we thus give the statute the admitted use of the vessel was within its provision and therefore the amount due for excise was rightfully imposed and under our interpretation was due when demanded, we must consider whether the asserted repugnancy of the statute to the Constitution is well founded.

It has been conclusively determined that the requirement of uniformity which the Constitution imposes upon Congress in the levy of excise taxes is not an intrinsic uniformity, but merely a geographical one. *Flint* v. *Stone-Tracy Company*, 220 U. S. 107; *McCray* v. *United States*, 195 U. S. 27; *Knowlton* v. *Moore*, 178 U. S. 41. It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment. *McCray* v. *United States*, 195 U. S. 27 and authorities there cited.

Nor is there anything in *Carroll* v. *Greenwich Insurance Company*, 199 U. S. 401, or *Twining* v. *New Jersey*, 211 U. S. 78, which in the remotest degree nullifies or restricts the principle thus stated. Indeed it is apparent, if the suggestion as to the meaning of those cases were assented to, it would result in rendering the Constitution unconstitutional. This certainly was the view entertained by the pleader when the answer in the case was prepared, since the sole attack on the constitutionality of the statute was based upon the assertion that it was repugnant to the due process clause of the Fifth Amendment. And such also is the line of the argument at bar where the fundamental rights secured by the Fifth Amendment are constantly referred to as the basis upon which the unconstitutionality of the statute is urged. Is there foundation for this claim under the Fifth Amendment? is then the issue, and that of course requires a statement of the grievances which it is asserted result from upholding the tax. They all come to this, that to impose a burden in the shape of a tax upon the use of a foreign-built yacht when a like tax is not imposed on the use of a domestic yacht under similar circumstances is so beyond the power of classification, so abhorrent to the sense of justice, and so repugnant to the conceptions of free government as to be void even in the absence of express constitutional limitation. We do not stop to point out the obvious unsoundness of the contentions, nor indeed to direct attention to the self-evident demonstration of their want of merit even from the point of view of the power to classify, since the difference between things domestic and things foreign and their use are apparent on the face of things and are expressly manifested by the text of the Constitution. We say we do not stop to do these things because in any event we are of opinion the conclusion cannot be escaped that the propositions, each and all of them, whatever may be their form of expression, are in substance and effect but an

assertion that the tax which the statute imposes is void because of a want of intrinsic uniformity, and therefore all the contentions are adversely disposed of by the previous decisions of this court on that subject. That which is settled beyond dispute may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed.

Was the Government entitled to interest? is then the remaining question which we must decide in view of the purpose which we at the outset expressed of treating the United States as here present and urging its right to interest on a cross-writ of error. The cyclopedias and textbooks state the doctrine to be that in the absence of a statute expressly so directing, taxes bear no interest. The principle is thus announced in 37 Cyc., p. 1165: "Delinquent taxes do not bear interest unless it is expressly so provided by statute. But it is competent for the legislature to prescribe the payment of interest as a penalty for delay in the payment of taxes and to regulate its rate. This, however, can be effected only by an act plainly manifesting the legislative intention as to the right to recover interest, its amount, and the date from which it shall begin, the latter being ordinarily the time when the assessment is complete and the taxes become payable." Cooley on Taxation, p. 17; Sedgwick on Damages (9th ed.), § 332; Sutherland (3d ed.), § 337; Black on Tax Titles (2d ed.), § 236, and see note in 6 L. R. A. (N. S.), p. 694. And the statement of the text is borne out by the decided cases in nearly all of the state courts of last resort. On the other hand, the Government relies upon four cases in this court where interest was allowed as a matter of course on taxes due the United States. *Cheang-Kee* v. *United States*, 3 Wall. 320; *Railroad Co.* v. *United States*, 101 U. S. 543; *Litchfield* v. *County of Webster*, 101 U. S. 773; *United States* v. *Erie Railway Company*, 106

U. S. 327. We say as a matter of course because in the cases referred to, the subject was not discussed and the liability for interest was practically admitted. The Government also relies on a careful and clear opinion by Maxey, Judge, in the Circuit Court for the Western District of Texas, holding that interest was due to the United States on customs duties. *United States* v. *Mexican &c. R. Co.*, 154 Fed. Rep. 519. Whether the practice applied in the previous decisions of this court should be now followed or the theory established by the state cases adopted and made the rule as to taxes due the United States, is therefore the question. Its solution must depend not upon the mere authority of the state cases, but upon the conclusiveness of the principles upon which such cases rest and their concurrence with the principles by which interest is allowed in the courts of the United States, considerations which require us to determine the nature of the duty which arises from the liability for a tax imposed by the United States, not only inherently but as well from the practice which has obtained in the past in the enforcement of the law of the United States and the implication of legislative sanction, if any, to such practice which may have arisen. It would serve no purpose to refer to the abhorrence which obtained in early times concerning the payment of interest and the evolution by which the legitimate character of interest was gradually understood and it came to be recognized that its payment was, as a general principle, but the compensation due for the use of money or that its allowance was merely for damages caused by delay in discharging a duty and therefore in default on a contract to pay money even without express legislation so directing, interest would be allowed. The subject was explained in *National Bank* v. *Mechanics National Bank*, 94 U. S. 437 and was reviewed in *Reid* v. *Rensselaer Glass Factory*, 3 Cow. 393, 5 Cow. 587. To avoid prolixity we do not review the

state cases as to non-liability for interest on default for taxes but content ourselves with stating that we think it is apparent that the conclusion which they sustain, leaving aside minor differences rests upon two fundamental propositions: First the necessity for an express statute providing for interest except in cases of contract, and second, that even where there is a statute providing for interest on all debts, such statute is not applicable to taxes because they are not debts and therefore must be enforced alone by virtue of express legislative penalties, except where a provision exists giving *eo nomine* interest on taxes. But both of these propositions are in conflict with the settled doctrine established by the decision of this court. Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. *Young* v. *Godbe*, 15 Wall. 562, 565:

"It is said there is no law in the Territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character."

And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice even though no express statute existed for compelling this payment. So also as to the nature and character of the obligation to pay taxes. As long ago as *Meredith* v. *United States*, 13 Peters, 486, it was decided, the court speaking by Mr. Justice Story (p. 493):

"It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer. . . ."

Again in *United States* v. *Chamberlin*, 219 U. S. 250, the nature and character of an obligation to pay a stamp duty was considered, and the right to collect it by action of debt was passed upon and it was held that the obligation to pay was a debt and that it could be enforced by suit in the absence of an exclusive remedy created by the statute by which the obligation was imposed. In the course of the opinion, various decisions of this court recognizing the right of the United States to enforce internal revenue duties by suit were referred to and the statute to the same end was cited and its application to the case in hand was pointed out upon grounds which in reason may well be said to cause the statute to be applicable to the case here before us. In addition, in repeated adjudications in this court it has been settled that in a suit to recover taxes which have been illegally assessed interest would be allowed against the official although the real responsibility was on the Government. The concluded doctrine on this subject was thus stated in a recent case after referring to the exemption of the United States from liability for interest (*National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496):

"On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the Treasury. *Erskine* v. *Van Arsdale*, 15 Wall. 75; *Redfield* v. *Bartels*, 139 U. S. 694."

The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to

contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory authority, in the other the right to sue for taxes as for a debt in every case where not prohibited by statute.

From this review it results that the doctrine as to nonliability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules. From this it follows that although in the cases in this court to which we at the outset made reference which enforced the liability for interest and which are here controlling if they be not now overruled, there was no controversy as to the liability for interest, this was presumably because the matter was deemed not disputable as the direct result of the then settled doctrine that interest could be recovered by the United States on a default in payment of import duties. Under this condition we can see no ground for departing from the rule which the cases enforced, and we are therefore constrained to the conclusion that the court below was wrong in rejecting the prayer of the Government for interest and its action in that respect must be reversed while in others it must be affirmed.

Modified and affirmed.

UNITED STATES v. BILLINGS.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BILLINGS v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 626 and 67. Argued January 6, 7, 1914.—Decided February 24, 1914.

Decided on authority of *Billings* v. *United States*, *ante*, p. 261. 190 Fed. Rep. 359, modified and affirmed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[2]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

These two cases are controlled by the two cases between the same parties just decided. In the case which is here on error, the suit was brought by the United States to recover the amount of the tax which became due upon the yacht Vanadis, on the first day of September, 1910, under the act of August 5, 1909, which was under consideration in the previous cases. The complaint, leaving aside some additional averments which it is unnecessary to refer to, was the same as the one in the cases already passed upon, and this is true also of the answer. The case

[1] See argument, p. 269, *ante*.

[2] See argument, p. 263, *ante*.

by stipulation was submitted to the court without a jury and the steps essential to save all the questions in the case were properly taken. The use of the vessel during the taxing period was shown. There was a judgment in favor of the United States for the amount of the tax, but against it for interest and error was prosecuted from the Circuit Court of Appeals to review that subject and such case is here on certificate. Taking jurisdiction of both cases and treating them as one, as was done in the previous cases, and applying the conclusions in those cases expressed, to this, it results that the judgment below must be modified, so far as the interest is concerned, by allowing the claim of the United States in that respect, and in other respects it must be affirmed.

And it is so ordered.

PIERCE *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* PIERCE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 64 and 623. Argued January 6, 7, 1914.—Decided February 24, 1914.

Billings v. *United States*, *ante*, p. 261, followed and distinguished, to the effect that the owner of a foreign-built yacht is not liable for the tax imposed by § 37 of the Tariff Act of 1909, if the yacht was not actually used at all during the preceding year.

190 Fed. Rep. 359, reversed.

THE facts are stated in the opinion.

Mr. William D. Guthrie, for the yacht owner in this and other cases argued simultaneously herewith.[1]

[1] See argument, p. 263, *ante*.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

These two cases involve the liability of the plaintiff in error in No. 64 for a tax on the foreign-built yacht Yacona, which became due on the first of September, 1909. The complaint in every substantial particular was identical with that filed in the *Billings Case* this day decided, and this is true also of the defenses set up in the answer except that the answer in this case contained this distinct averment which was not in the *Billings Case:* "That the said yacht Yacona was not in use by the defendant or by any other person at any time during the year next preceding the first day of September, 1909, but was out of commission and laid up unused at Brooklyn in the State of New York, throughout the whole of such year." The case was submitted on bill and answer and the liability for the tax which was upheld by the court below was rested upon the construction as to potential use that is a tax on the privilege of using which we decided in the *Billings Case* to be unsound. In this case, as in that, the certificate is concerned with a writ of error prosecuted by the United States to the Circuit Court of Appeals because of the rejection of a prayer for interest. Treating both the cases in this instance as one, as we did in the previous cases, and applying to this the construction which we have given the statute in those cases, it follows that the judgment below was wrong and must be reversed, with direction to dismiss the complaint.

And it is so ordered.

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[1] See argument, p. 269, *ante*.

PIERCE *v.* UNITED STATES (NO. 2).

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* PIERCE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 65, 624. Argued January 6, 7, 1914.—Decided February 24, 1914.

Decided on authority of *Pierce* v. *United States*, *ante*, p. 290.
190 Fed. Rep. 359, reversed.

THE facts are stated in the opinion.

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[1]

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[2]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

These cases concern the right to recover a tax on the yacht Yacona, becoming due on the first of September, 1910. The complaint filed by the United States in No. 65 was in substance like that filed in the previous cases and the answer in effect set up the same defenses, especially the defense relating to the non-use of the yacht. The case, by stipulation, was submitted to the court without a jury, a finding of facts was made which distinctly established

[1] See argument, p. 263, *ante*.
[2] See argument, p. 269, *ante*.

the non-use during the taxing year and the court gave a judgment for the tax, although it rejected the interest, upon the same construction of the act which it applied in the previous cases. The certificate in this as in the other cases is here in consequence of error prosecuted by the United States to the Circuit Court of Appeals, because of the rejection of the interest claimed. Treating this case as we treated the others and applying the construction in those cases given, it follows that the judgment in this case must be reversed.

And it is so ordered.

UNITED STATES *v.* GOELET.

CERTIFICATES FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 631, 632. Argued January 6, 7, 1914.—Decided February 24, 1914.

Billings v. *United States, ante*, p. 261, followed to the effect that the tax on the use of foreign-built yachts imposed by § 37 of the Tariff Act of 1909 is not an unconstitutional exercise of power by Congress, and it became due for the year 1909 on the first day of September, 1909.

While Congress may have the power to impose an excise duty on a citizen permanently domiciled abroad, such an imposition is so unusual that an intent to do so will not be presumed unless clearly expressed.

The expectation of those who sought the enactment of legislation may not be used for the purpose of affixing to such legislation, when enacted, a meaning which it does not express.

The tax imposed by § 37 of the Tariff Act of 1909 does not apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than one year prior to September 1, 1909, and to the levy of such tax.

THE facts, which involve the construction and constitutionality of § 37 of the Tariff Act of 1909, imposing a tax

on foreign-built yachts and the application of that section to a yacht owned by an American citizen permanently domiciled abroad and which had not been within the jurisdiction of the United States during a part of the period for which the tax was levied, are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[2]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The questions asked in both of these cases relate to § 37 of the Tariff Act of 1909 which we have construed in several opinions just announced. They both concern the sum of excise duties levied on the foreign-built yacht Nahma, the one assessed for the year ending on the first of September, 1909 and the other on the first of September, 1910. The cases were decided by the trial court at the same time with other cases for a like period, the case relating to the tax for 1909 having been submitted on bill and answer as a result of the overruling of a demurrer filed by the Government to the answer of the defendant and the election to plead no further, and the case involving the levy for 1910 having been decided by the court along with other cases without the intervention of a jury as the result of a stipulation between the parties. The certificate fully states the situation as to both periods of taxation conforming to the conditions of fact which we have recapitulated in the opinions in the two *Billings Cases*, *ante*,

[1] See argument, p. 269, *ante*.
[2] See argument, p. 263, *ante*.

pp. 261 and 289, and the questions asked concerning the construction of the statute, its operation and its constitutionality involve all the subject-matters which we have disposed of in the previous opinions. In both of these cases however, differing from those which we have previously decided, in the pleadings concerning the 1909 tax it was expressly averred and by the demurrer conceded that the owner of the yacht at least for a year prior to the levy of the tax, was domiciled in a foreign country and that the yacht whose use was taxed had a permanent situs in such country, and so far as the levy for 1910 is concerned that state of things as shown by the certificate was expressly covered by the findings of fact; and if the opinion of the trial court be considered, it will appear that it was one of these peculiarities of fact, that is, the permanent domicile abroad, which led that court, instead of deciding in favor of the tax, to hold that as to both periods it was unauthorized by the statute. To make the situation perfectly clear we quote from the certificate in the case concerning the 1909 tax (No. 631) the exact language of the answer on the subjects just stated, the equivalent of which is embraced in case involving the 1910 tax (No. 632), as follows:

"That the defendant was, on September 1, 1909, and for several years prior thereto had been permanently a resident of and domiciled at Paris, in the Republic of France; and that since 1901 her said yacht had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of Great Britain."

For the purpose of enabling it to determine the influence of the facts thus stated upon the decision of these two cases, the court, in its certificate in addition to many questions involving the issues of construction and constitutionality which we have disposed of in the other cases asks two questions whose order of statement we rearrange as follows:

"II. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than one year prior to September 1, 1909, and to the levy of such tax?

"I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?"

It is manifest from what we have said that the response to these two questions will be substantially determinative of all the questions which the certificate propounds since if we answer either of them in the negative, the case will be disposed of and there will be no occasion to reply to the others, and if on the contrary we answer both of them in the affirmative there will be no need to do anything but state our reply to the other questions, since the reasons for such reply will be controlled by the opinions which we have previously announced. We come then to consider the questions in the order stated.

Not in the slightest degree questioning that there was power to impose the excise duty on the citizen owning a foreign-built yacht wholly irrespective of the fact that he was permanently domiciled in a foreign country and putting out of view all questions concerning the non-application of the statute to the case in hand purely because of the situs of the yacht itself, the single matter for decision is, do the terms of the statute provide for the payment by a citizen of the United States who has a permanent residence and domicile abroad of an excise duty because of the use by him as owner or charterer under the terms of the statute of a foreign-built yacht? It may not

be doubted, as observed by the trial court in these cases (omitting the consideration of taxes imposed on property having a situs within the jurisdiction of the taxing authority), speaking in a general sense that the taxing power, when exerted, is not usually applied to those, even albeit they are citizens, who have a permanent domicile or residence outside of the country levying the tax. Indeed we think it must be conceded that the levy of such a tax is so beyond the normal and usual exercise of the taxing power, as to cause it to be, when exerted, of rare occurrence and in the fullest sense exceptional. This being true, we must approach the statute for the purpose of ascertaining whether its provisions sanction such rare and exceptional taxation. Considering the text, we search in vain for the express declaration of such authority. True, it is argued by the United States, that as the tax is levied on any citizen using a foreign-built yacht and as any includes all, therefore the statute expressly embraces a citizen permanently domiciled and residing abroad. But this argument in effect begs the question for decision which is whether the use of the general words, any citizen, without more should be considered as expressing more than the general rule of taxation, or in other words can be treated without the expression of more as embracing the exceptional exertion of the power to tax one permanently residing abroad. As illustrative and throwing light on the real question for decision, action taken by Congress in exerting its taxing power is at least worthy of note. For instance the provisions of the income tax law of June 30, 1864 (c. 173, 13 Stat. 223, 281), expressly extended that tax to those domiciled abroad and a like purpose is beyond doubt expressed in the income tax of 1913 (subdivision 1 of the Tariff Act of October 3, 1913). But without resting this case upon the implication against the conferring of the authority here claimed from the mere want of express statement in the statute of the giving of such exceptional

power, and treating such implication as not in and of itself absolutely conclusive, we think when to the force of such inference, even though it be limited, there is added the weight arising from that which is expressly stated in the statute, the conclusion against want of power conferred to levy the tax here asserted is established. This arises from the command of the statute that the tax shall be levied "by the collector of customs of the district nearest the residence of the managing owner" etc., since the consequence of such command is to associate residence with citizenship and establishes such a relationship between them as to bring about the result which we have just stated. Nor do we think there is anything as suggested by the argument of the United States in the case of *Eidman v. Martinez*, 184 U. S. 578, which militates against the views just stated and this also is true of the suggestion made in argument concerning the circulation by those interested in the enactment, of the provision of a list of yachts which would become subject to the tax if the provision was enacted, which list included the yacht taxed in this case. The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express.

For the reasons just stated we conclude to answer the second question in the negative and not to reply to the others, as it becomes unnecessary to do so.

And it will be so certified.

UNITED STATES v. BENNETT.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 629. Argued January 6, 7, 1914.—Decided February 24, 1914.

The rule of interpretation that where there are two possible constructions of a statute, one of which will give rise to grave doubts of its constitutionality and the other avoids such question, the latter will be adopted, is based on the existence of both conditions as to more than one construction and doubt and is not applicable where neither of those conditions exists.

The limitations of due process of law which prevent States from taxing property in another State do not apply to the United States, the admitted taxing power of which is co-extensive with the limits of the United States and knows no restriction save as expressed in or arising from the Constitution itself.

The Government of the United States as a nation by its very nature benefits the citizen and his property wherever found, and no imaginary barrier shuts that Government off from exerting the powers which inherently belong to it by virtue of its sovereignty.

The tax imposed by § 37 of the Tariff Act of 1909 applies to the use of a foreign-built yacht owned by a citizen of the United States, although such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States.

The tax imposed by said act operated retrospectively, so as to be payable on September 1, 1909, in respect of the year then ended, and not only prospectively so as to become first due and payable on September 1, 1910.

The whole amount of the tax imposed by said act became due and payable on September 1, 1909, and not only such proportion thereof as the time during which the act was in force at that date bore to the whole year.

Congress has the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since a time preceding the passage of the act was not, at any time used within the territorial jurisdiction of the United States and which has its permanent situs in a foreign country.

Said act of Congress, imposing a tax upon the use of foreign-built yachts alone, provides a valid tax, and a valid classification for purposes of taxation, within the power to lay and collect taxes delegated to Congress by the Constitution of the United States.

The tax imposed by said act is not in conflict with the requirement of due process of law contained in the Fifth Amendment to the Constitution of the United States.

The United States is entitled to recover interest upon the tax imposed upon the use of foreign-built yachts under § 37 of the Tariff Act of August 5, 1909.

This court answers the questions certified, in this case, according to the facts stated in the certificate, and nothing in the replies should be so construed as to deprive the court below of the power to take such steps as it may deem necessary to avoid injustice by reason of any mistake of fact that may be corrected.

THE facts, which involve the construction and constitutionality of § 37 of the Tariff Act of 1909 imposing a tax on foreign-built yachts and its application to a yacht owned by an American citizen but which had not been within the jurisdiction of the United States during any part of the period for which the tax was levied, are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[2]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

So far as we deem it material to the question we are called upon to answer, the certificate in this case is as follows:

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[1] See argument, p. 269, *ante*.

[2] See argument, p. 263, *ante*.

"The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered on July 6, 1911, dismissing the amended complaint of the United States in an action brought against the defendant below to recover the tax imposed by § 37 of the tariff act of August 5, 1909, c. 6, 36 Stat. 112, for the year ended September 1, 1909, upon the use of the foreign-built yacht 'Lysistrata,' owned by the defendant."

After reciting the averment as to the assessment of the tax by the collector amounting to $13,601 and the failure of the defendant to pay, his citizenship and ownership of the yacht and the conformity of the assessment to the statute, the certificate states that there was a prayer for the recovery of the amount with interest. It then proceeds to state the answer of the defendant, setting up the non-registry and non-enrollment of the yacht, that she enjoyed no protection or privileges of any kind under the laws of the United States and that the yacht since 1904 "had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of the Republic of France." The certificate then proceeds to state the facts as to ownership of other yachts in the United States in the exact words used in the answers in previous cases which we have this day decided and upon which the want of due process of law was set up. Then the certificate declares the United States demurred to this answer and that this demurrer was overruled and the United States electing to plead no further, there was judgment rejecting its claim and that error was then prosecuted to the Circuit Court of Appeals by the United States. The seven questions propounded are the equivalent of the questions in the *Goelet Cases*, just decided, except there is no question asked concerning the power to tax under the statute in case of the permanent domicile of

the owner in a foreign country which was the basis of the decision in the *Goelet Cases* because, as is shown by the certificate there was no assertion or proof that there was a permanent foreign domicile of the owner in this case. So that the first question in this case concerns the liability of a citizen of the United States having a domicile therein, for a tax on a yacht owned and used during the taxing period outside of the United States and is as follows: "I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?" And if this question is answered in the affirmative, then the duty will arise of deciding whether because of that aspect the act is repugnant to the due process clause of the Constitution, since in determining the constitutionality of the act in the previous cases we were not called upon to decide whether the due process clause of the Fifth Amendment operates to prevent the levy of such a tax.

The statute applies, since, under the construction we have given it, it clearly establishes three standards as the basis of the excise duty which it imposes: citizenship and domicile within the United States, control by ownership or charter of a foreign-built yacht within the terms of the statute, and its use by the owner during the taxing period. But it is said that as in any event the use which the statute taxes is solely a use within the United States, therefore the statute does not embrace this case, since the finding establishes that the yacht whose use is here taxed was wholly used and located outside of the territorial limits of the United States. We fail, however, to find in the provisions of the statute any language which would justify our affixing to the word "use" the restricted sense upon which

the proposition is based. On the contrary, the use provided for in the statute is unqualified, is generic and must be enforced in that sense if the statute is to be given its plain meaning. It is true that in deciding a previous case we held that the statute would not be construed without clear intendment manifested to that effect as including a tax on a citizen permanently domiciled outside of the geographical limits of the United States. But that ruling was based upon the proposition that as a taxing statute was usually confined to persons within the territorial jurisdiction of a taxing authority and to do otherwise would be exceptional, unless such view was compelled by its terms, the statute here involved ought not to be construed as having been adopted to accomplish such unusual and strange result. The directly opposite, is here applicable, since it is usual, where the taxing power is called into play as to an individual domiciled within the territorial limits of the taxing authority, to cause the manifestation of taxing power to be coterminous with the taxing authority of the Government levying the tax. Therefore it follows that the principle of interpretation previously applied has no possible application to the construction of the word, "use," which we are now considering. The difference between the two rules is that which must exist between not assuming in the one case that something exceptional has been done, and taking for granted in the other that a power expressed embraces that which is usual and incidental to its exertion. The argument that the statute should not be construed as applying to the use of a yacht wholly beyond the territorial limits of the United States, since if so interpreted it would be repugnant to the Constitution, rests upon what in effect is a misconception of the elementary rule of interpretation that where there are two possible constructions of a statute, one of which will give rise to grave doubt as to its constitutionality and the other avoids such question, the latter will be adopted.

The foundation of this rule is the possibility of two constructions and the existence of the grave doubt as to constitutionality. To apply the rule in a case like this, where neither of such conditions exists would be to cause an imaginary doubt as to the constitutionality of a statute to render it necessary to give to the statute a wholly fictitious and unauthorized meaning, that is to say, the effect of adopting the contention would be but to declare that in every case where the construction of a statute was in issue its misconstruction would become necessary if only it was asserted that if rightly construed repugnancy to the Constitution would result. We come then to consider the contention that when the statute is correctly interpreted there will arise a conflict between its provisions and the safeguards of the Constitution not only for the purpose of demonstrating the unsoundness of the assertion of constitutional right, but also with the object of making it clear that even if the statute were susceptible of a different construction by resort to subtlety of reasoning or refinement of distinction, there is nothing of such gravity in the asserted constitutional question as to lead us to resort to such means in order to avoid giving to the statute the meaning which we have affixed to it resulting from its unambiguous text.

As not even an intimation is made in the argument that any limitation on the taxing power of Congress in this regard can be deduced from the provisions of the Constitution concerning the taxing authority and as the only limiting provision relied upon is the due process clause of the Fifth Amendment, it follows in this case, as it did in the *Fillings Case*, that after all the assertion of want of power must rest upon the assumption that an attempt by the United States to tax the property of a citizen residing within its jurisdiction where such property is beyond the territorial limits of the United States, is so in conflict with obvious principles of justice and so inconsistent with

every conception of representative and free government as to cause the exertion of power to come within the limitations of the due process clause of the Fifth Amendment. We might well leave the answer to the contention when it is thus rightly understood to result from its mere statement, from the obvious misconceptions as to the nature and extent of the authority of a sovereign although it be a representative government, and from a true appreciation of the privileges as well as the duties arising from citizenship and the past and recent exertions by Congress of the very taxing authority which is now challenged. (See act of June 30, 1864, 13 Stat. 223, 281.) We do not however leave the contentions to be destroyed by their own weakness, but come briefly to consider the authorities which it is insisted maintain their correctness and to point out the error of the reasoning upon which their asserted applicability is based. We do not cite or review the cases relied on because we concede that the doctrine which it is asserted they decided is elementary and in fact is the settled rule in this court. The principle of the cases is thus stated in the argument: "It is a settled rule of constitutional law that the power to tax depends upon jurisdiction of the subject-matter of the tax. A long line of unbroken authority illustrates this firmly established doctrine in its various aspects and although the cases have all arisen under state tax laws, their reasoning is applicable to and controlling in the case of a Federal tax act." But the misapprehension consists not in a misconception as to what the cases relied on decided, but in taking for granted that because the doctrine stated has been applied and enforced in many decisions with respect to the taxing power of the States, that the same principle is applicable to and controlling as to the United States in the exercise of its powers. The confusion results from not observing that the rule applied in the cases relied upon to many forms of exertion of state taxing power is based on

the limitations on state authority to tax resulting from the distribution of powers ordained by the Constitution. In other words, the whole argument proceeds upon the mistaken supposition, which is sometimes indulged in, that the calling into being of the Government under the Constitution, had the effect of destroying obvious powers of government instead of preserving and distributing such powers. The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is coëxtensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the States within their allotted spheres, for if it were not so then government in the plenary and usual acceptation of that word would have no existence. Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty. But it is said in the decided cases relied upon, the principle which was an-

nounced was that the power to tax was limited by the capacity of the taxing government to afford that benefit and protection which is the true basis of the right to tax and which causes, therefore, taxation where such capacity to confer benefit and afford protection does not exist to be a mere arbitrary and unwarranted burden. But here again the confusion of thought consists in mistaking the scope and extent of the sovereign power of the United States as a nation and its relation to its citizens and their relations to it. It presumes that government does not by its very nature benefit the citizen and his property wherever found. Indeed, the argument, while holding on to citizenship, belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial.

Concluding from what we have just said that the first question must be answered in the affirmative, it follows from the considerations just stated and the views which we have expressed in the previous cases as to the operation and constitutionality of the act in other respects, that the remaining questions must be answered as follows: The second, Yes; the third, Yes, the whole tax; the fourth, Yes; the fifth, Yes; the sixth, No; the seventh relating to interest, Yes.[1]

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[1] The questions propounded were as follows:

I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?

II. Did the tax purporting to be imposed by said act of Congress operate retrospectively, so as to be payable on September 1, 1909, in respect of the year then ended, or only prospectively, so as to become first due and payable on September 1, 1910?

III. Did the whole amount of the tax purporting to be imposed by said act of Congress become due and payable on September 1, 1909,

As by these answers the right to impose and collect the tax under the facts stated will be established, in view of what we shall say in a case between the same parties which follows this, we think it proper to observe that nothing in our reply to these questions is to be so construed as to deprive the court below of the power to take such steps as it may deem necessary to avoid injustice if it should be deemed that by some mistake of fact such a result might occur. The answers to the questions will be certified in accordance with the directions above given.

And it is so ordered.

UNITED STATES *v.* BENNETT (NO. 2).

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 630. Argued January 6, 7, 1914.—Decided February 24, 1914.

United States v. *Goelet*, *ante*, p. 293, followed to effect that the tax imposed by § 37 of the Tariff Act of 1909 does not apply to the use of a foreign-built yacht owned by a citizen of the United States who

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or only such proportion thereof as the time during which the act was in force at that date bears to the whole year?

IV. Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually and since the year 1904 was not at any time used within the territorial jurisdiction of the United States and which has its permanent situs in a foreign country?

V. Does said act of Congress, by purporting to impose a tax upon the use of foreign-built yachts alone, provide a valid tax, or a valid classification for purposes of taxation, within the power to lay and collect taxes delegated to Congress by the Constitution of the United States?

VI. Is the tax purporting to be imposed by said act of Congress in conflict with the requirement of due process of law contained in the fifth article of amendment to the Constitution of the United States?

VII. Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the Tariff Act of August 5, 1909?

was permanently resident and domiciled in a foreign country for more than one year prior to September 1, 1909, and to the levy of such tax.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. William D. Guthrie for the yacht owner in this and other cases argued simultaneously herewith.[2]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The certificate discloses that this case involves the right of the United States to recover an excise duty levied under § 37 of the Tariff Act of 1909 which became due on September 1, 1910, on the same yacht which was the subject of the duty becoming due in 1909 and which we have passed upon in the case just decided. All the statements as to the complaint and answer, the submission of the case by stipulation to the court without a jury, the judgment rejecting the claim of the United States and the prosecution of error from the court below are in substance like those stated in the case concerning the tax for 1910 between the United States and Goelet this day decided. As the result of this situation, the certificate recites, differing in that respect from the *Bennett Case* just previously decided, the trial court made the following finding: "Defendant is a citizen of the United States and for some years past has been domiciled in and resident of the Republic of France."

Conformably to this finding the second question propounded by the court below in this case, asks whether the act applies where the owner of the yacht, although a citizen, was permanently domiciled and residing in a foreign country for more than two years prior to Sep-

[1] See argument, p. 269, *ante*.

[2] See argument, p. 263, *ante*.

tember 1, 1910, and to the levy of such tax. As for the reasons stated in the *Goelet Case*, such question was answered in the negative, it follows that a like reply must be made here and therefore there is no need of replying to any of the other questions. In deciding the previous case between the same parties, we made a reservation concerning the power of the court below to deal with the former case in the future, because of the fact that the findings in this case are absolutely in conflict with the state of things exhibited in the previous *Bennett Case*. Our order will be, second question answered in the negative and the other questions not answered.

And it will be so certified.

RAINEY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* RAINEY.

CERTIFICATE FROM THE CIRCUIT OF APPEALS FOR THE SECOND CIRCUIT.

RAINEY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* RAINEY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 74, 627, 73, 628. Argued January 6, 7, 1914.—Decided February 24, 1914.

Billings v. *United States*, *ante*, p. 261, followed to the effect that under § 37 of the Tariff Act of 1909, in imposing a tax on the use of foreign-built yachts there is authority to bring an action *in personam* against the owner for the recovery; that the tax became due on the first day

of September next following the passage of the act; that the six months' clause applied only to the charterer and not to the owner of such a yacht; and that the statute does not violate the due process clause of the Fifth Amendment.

The second paragraph of § 37 of the Tariff Act of 1909 giving the owner of a foreign-built yacht an option to pay an *ad valorem* of 35 per cent. in lieu of the annual tonnage tax imposed on the use of such yacht by the first paragraph of the section, is separable from the first paragraph and its validity is not involved in an action to recover the tonnage tax from the owner of a foreign-built yacht who has not availed of the option.

Quære, whether one not the subject of the other contracting power to a treaty with the United States can invoke the protection of that treaty in regard to property rights.

When a treaty is inconsistent with a subsequent act of Congress the latter will prevail.

The Constitution does not declare that the law established by a treaty shall never be altered or repealed by Congress; and while good faith may cause Congress to refrain from making any change in such law, if it does so its enactment becomes the law.

Although the other contracting power to a treaty may have ground for complaint if Congress passes a law changing the law established by the treaty, every person is still bound to obey the latest law passed.

No person acquires any vested right to the continued operation of a treaty.

Even if there is judicial power to inquire whether a provision in a duly promulgated act of Congress raising revenue originated in the House of Representatives in accordance with Art. I, § 7 of the Constitution, it is sufficient if it appears that it was an amendment in the Senate to an act that originated in the House; and, after the act has been enrolled and duly authenticated, the court will not inquire whether the amendment was or was not outside the purposes of the original bill.

Where on direct appeal from the Circuit Court by one party based on constitutional questions the whole case can be disposed of, the questions certified by the Circuit Court of Appeals on an appeal taken by the other party need not be answered, and the judgment of the Circuit Court can be modified to the extent necessary and affirmed.

190 Fed. Rep. 359, modified and affirmed.

THE facts, which involve the construction and constitutionality of § 37 of the Tariff Act of 1909 imposing

a tax on the use of foreign-built yachts and the liability of the owner for such tax, are stated in the opinion.

Mr. C. Andrade, Jr., for Rainey:

The act on its face shows that it was intended to operate prospectively; and therefore the tax is not payable until September 1, 1910.

The act does not levy a tax, but deprives defendant of his property without due process of law. The 35% duty is a direct tax, and void because not apportioned.

The seven dollar per ton annual tax on the use of the yacht is an excise or indirect tax, and void for want of uniformity.

Defendant's use of the yacht prior to August 5, 1909, tax free, was property. In order to make the tax fall due September 1, 1909, it is necessary to destroy such tax-free use of the yacht prior to August 5, 1909, which is a deprivation of property without due process of law.

A recovery in this action would destroy rights vested in the defendant under the British treaty of 1815, and would deprive defendant of his property without due process of law; and further Congress did not intend to annul the treaty of 1815.

The act does not authorize any action *in personam* against the owner or managing owner.

The yacht tax is void, as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives.

In support of these contentions, see act of June 5, 1794, § 3; *American* v. *Worthington*, 141 U. S. 468; *Benziger* v. *United States*, 192 U. S. 38; British Treaties of July 3, 1815, October 20, 1818, August 6, 1827; *Chew Heong* v. *United States*, 112 U. S. 536; Cong. Rec., 61st. Cong., pp. 1573, 4275; Cooley, Const. Lim., p. 528; *Harvey* v. *Tyler*, 2 Wall. 328; *Hylton* v. *United States*, 3 Dall. 171; *Knowlton* v. *Moore*, 178 U. S. 41; *Lewis* v. *Penna. R. R.*

Co., 220 Pa. St. 317; *McEwen* v. *Den*, 24 How. 242; *Murray* v. *Gibson*, 15 How. 421; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601; *Re Pennsylvania Telephone Co.*, 2 Chest. Co. Rep. (Pa.) 129, 131; Rev. Stat., §§ 4131, 4132; *Sohn* v. *Waterson*, 17 Wall. 596; *State* v. *Smith*, 28 N. W. Rep. 241; Story on Const., 4th ed., p. 622; *The Miranda*, 47 Fed. Rep. 815, aff'd, 51 Fed. Rep. 523; *Thomas* v. *United States*, 192 U. S. 363, 370; *Twenty per Cent Cases*, 20 Wall. 179; *United States* v. *Heath*, 3 Cranch, 399; *United States* v. *Reese*, 5 Dillon (Kans.), 405; *United States* v. *Wigglesworth*, 2 Story (Mass.), 369; *Warren* v. *Crosby*, 34 Pac. Rep. 661.

Mr. Assistant Attorney General Adkins, with whom *Mr. Karl W. Kirchwey* was on the brief, for the United States.[1]

Mr. Chief Justice White delivered the opinion of the court.

The first two of the foregoing cases relate to a tax becoming due on the first of September, 1909, and the other two to a tax becoming due on the first of September, 1910, the taxes in all cases having been levied pursuant to § 37 of the Tariff Act of 1909 on the British built yacht Cassandra owned by the plaintiff in error. In these cases, as in those arising under the same act, which we have just decided, the certificates of the Circuit Court of Appeals are here because of writs of error from that court prosecuted by the United States for the purpose of reviewing the action of the trial court in rejecting a demand for interest and the two other cases are here on direct writ of error to the court below, to review its action in upholding the tax. In both the cases brought directly here, the pleadings of the Government asserted the citizenship of the defendant, the use of the yacht during the taxing period and the other statutory

[1] For abstract of argument, see p. 269, *ante*.

essentials to fix liability. The answers not traversing citizenship, ownership or use, set up the same defences as were urged in the cases we have just decided, somewhat however reiterated and changed in form of statement, and other defences not made in the previous cases. In the first direct case, judgment was rendered in favor of the Government for the tax by submission on bill and answer. In the second a like judgment was rendered, the case having been submitted by stipulation to the court without a jury, and in that case the finding of fact made by the court as to the use of the yacht is as follows: "During the period from the said twenty-fifth day of June, 1908, the date when the defendant purchased the said yacht, to the first day of September, 1910, the yacht was used by the defendant both in the waters of the United States and in the waters of foreign countries, as well as on the high seas, and in the year immediately preceding the first day of September, 1910, the said yacht was used by the defendant continuously in the waters of the United States, except for the period from June 20, 1910, to July 30, 1910, when she was used by the defendant on a cruise to the Gulf of St. Lawrence."

Separate assignments of error were made in the two cases which are here on direct review and are referred to and discussed in the arguments at bar. They are all, in both cases, however, embraced in the ten separate propositions stated in the argument, and both cases will therefore be disposed of by briefly considering and deciding them. In doing so we shall bring the several assignments under common headings for the purpose of avoiding repetition. First, that the court erred in holding there was authority to bring an action *in personam* against the owner for the recovery of the tax. This is disposed of by the reasoning adopted in the *Billings Case* in passing on the question of liability for interest. Second, that error was committed in holding the first installment of

the tax was due in September 1909, and in deciding that the six months clause, under the section in question "applied only to the charterer and did not apply to the owner of a foreign-built yacht." Third, that error was committed in deciding that the tax did not violate the due process clause of the Fifth Amendment and was not in conflict with the uniformity clause of Art. I, § 8 of the Constitution. These grounds also are disposed of by the opinion in the *Billings Case*. Fourth, that error was committed in not deciding that § 37 of the act of 1909 "in so far as it lays a duty of 35 per cent. *ad valorem* is a direct tax and void because not apportioned in contravention of Art. I, § 2, and Art. I, § 9 of the Constitution of the United States." This proposition is concerned with the second paragraph of the statute in question which gives a right to the owner of foreign-built yachts of commutation, as follows:

"In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure-boat or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure-boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and Acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States."

We think the reasons given in the comprehensive opinion of the lower court in ruling adversely on this proposition are so conclusive that we adopt them and make them our own. The court said:

"The owner is not required to pay this duty. He is merely given the option to pay it. In its nature it would

seem to be a duty on imports and such duties are not held to be direct taxes requiring apportionment. But it is unnecessary to pass upon this question. These actions are for the recovery of the annual tonnage tax and the validity of the ad valorem tax is not involved. The provisions concerning that tax are separable from those concerning the annual tax. The one is not dependent upon the other and there is no indication that Congress would not have adopted the one without the other. Under such conditions it is well settled that unconstitutional provisions may be separated from legal provisions and effect be given to the latter."

Fifth, that error was committed in not holding that enforcement of the tax "would destroy rights vested in the defendant under the British Treaty of July 3, 1815" and would for such reason "deprive the defendant of his property without due process of law." The court below adequately disposed of this contention upon reasons which we also approve and adopt.

The court said:

"This defendant does not claim to be a British subject, and it is by no means clear that he is entitled to invoke the protection of the treaty. But, however that may be, it is well settled that when a treaty is inconsistent with a subsequent Act of Congress, the latter will prevail. *Taylor* v. *Morton*, 2 Curtis, 454; and see *Whitney* v. *Robertson*, 124 U. S. 190; *Head Money Cases*, 112 U. S. 580; *Cherokee Tobacco Case*, 11 Wall. 616; *Ropes* v. *Clinch*, 8 Blatchf. 304.

"Treaties are contracts between nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but

every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty."

Sixth, that error was committed in not deciding that § 37 of the act was not void "as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives, in contravention of Article I, section 7, of the Constitution of the United States." Without intimating that there is judicial power after an act of Congress has been duly promulgated to inquire in which House it originated for the purpose of determining its validity, and upon the assumption for the sake of the argument that such power may be invoked, again we think the court below disposed of the contention upon a ground entirely satisfactory which we adopt and approve, the court saying:

"I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient. Having become an enrolled and duly authenticated Act of Congress, it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill."

Following the practice adopted in the cases previously decided and treating, as we did in these cases, the United States as here on a cross-writ of error complaining of the refusal to allow interest, it follows that the questions asked by the Circuit Court of Appeals covered by the certificates need not be answered and that the judgments of the court below in the cases on direct writ of error in so far as they rejected the claim of interest will be modified to the extent necessary to allow such claim and in other respects will be affirmed. Therefore our order will be

Modified and affirmed.